UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDITH COTTON, individually and as Personal Representative of the Estate of Ralph Cotton, Plaintiff, v. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Defendant.	Civil Action No. 01-0801 TFH/DAR

REPORT AND RECOMMENDATION

Plaintiff Judith Cotton brings this action individually and as the personal representative of the Estate of Ralph Cotton, her late husband, for damages stemming from injuries Mr. Cotton sustained while riding an escalator at Defendant Washington Metropolitan Area Transit Authority ("WMATA") Reagan National Airport Metrorail station.[1] Second Amended Complaint ¶ 1. Pending for consideration by the undersigned United States Magistrate Judge is Defendant WMATA's Motion for Summary Judgment (Docket No. 122). For the reasons discussed herein, the undersigned will recommend that Defendant's motion be granted.

[1]This action initially was filed by Ralph and Judith Cotton. See Complaint (Docket No. 1). In their complaint, Plaintiff Ralph Cotton asserted a claim for personal injuries, and Plaintiff Judith Cotton asserted a claim for loss of consortium. Id. After an issue regarding Mr. Cotton's competency arose, Plaintiffs moved to amend the complaint to allow Mrs. Cotton to proceed as "Next Friend" of Mr. Cotton; however, the motion for leave to amend was denied without prejudice. September 16, 2002 Order (Docket No. 58) at 2; see also n.6, infra and accompanying text. Following Mr. Cotton's death, see April 30, 2003 Suggestion of Death April 30, 2003 (Docket No. 95), Plaintiff moved for leave to amend the complaint "to designate Judith Cotton as the Personal Representative of the Estate of Ralph Cotton." Motion to Amend Complaint (Docket No. 99) at 1. On August 20, 2003, the undersigned granted Plaintiff's motion, and the Second Amended Complaint of Plaintiff Judith Cotton individually and as the personal representative of the Estate of Ralph Cotton, was deemed filed as of that date. August 20, 2003 Order (Docket No. 127).

BACKGROUND

On April 25, 1999, Plaintiff Judith Cotton and her husband, Ralph Cotton, rode Metrorail to the Reagan National Airport Metrorail station, intending to depart National on a return flight to their home in New York.[2] Plaintiff and Mr. Cotton boarded escalator number three, a descending escalator at the north end of the Metrorail station.[3] While riding the escalator, Mr. Cotton fell and sustained injuries.

Plaintiff asserts that while on the escalator, Mr. Cotton "was exposed to the risk of serious bodily injury by reason of a dangerous, defective condition which existed in the Defendant's escalator system which required Defendant [sic] properly care for, maintain and monitor the escalator to prevent injury to users, and to adequately warn of the danger inherent in said escalator." Second Amended Complaint ¶ 3. Plaintiff contends that Defendant was aware of the defect but "negligently failed to remedy this condition and/or to properly maintain and monitor the condition, and negligently failed to warn the plaintiff of the hazard." Id. ¶ 4. In Count One of the two-count Second Amended Complaint, Plaintiff asserts a survival action on behalf of Mr. Cotton who, at the time of his death, had pursued a "claim for damages for failure of the Defendant to properly maintain and monitor its metrorail escalator system of which the escalator which injured him was a part." Id. ¶ 8. In Count Two, Plaintiff asserts a claim for loss

[2]In an apparent typographical error, Plaintiff, in one paragraph of the Second Amended Complaint, states that the accident occurred "[o]n or about April 28, 1999." Second Amended Complaint ¶ 2.

[3]The escalator is owned and operated by Defendant WMATA.

of consortium. Id. ¶ 10.[4]

On August 20, 2001, the undersigned entered an Initial Scheduling Order which provided, inter alia, for a period of discovery of eight months, and granted each side up to ten non-expert depositions and 40 interrogatories (Docket No. 10).

One month later, Plaintiffs moved for a protective order to bar the deposition of Plaintiff Ralph Cotton on the ground that "Mr. Cotton [was] very confused about his whereabouts and his memory [was] overtly compromised." Points and Authorities in Support of Plaintiffs' Motion for Protective Order (Docket No. 20) at 1. In the memorandum in support of their motion, Plaintiffs asked that the deposition of Mr. Cotton be "delay[ed] . . . until such time as an appropriate assessment of this plaintiff's competency to give testimony has been determined." Id. at 2. Defendant opposed the motion for protective order, moved to compel the deposition and requested entry of order directing the sequence of other depositions; in the alternative, Defendant moved for an independent medical examination of Plaintiff Ralph Cotton's competency (Docket Nos. 18, 19). On October 11, 2001, the undersigned granted both Plaintiffs' motion for a protective order and Defendant's motion for an independent medical examination of Plaintiff Ralph Cotton for the limited purpose of an evaluation of his competency (Docket No. 21). The undersigned further ordered that discovery by both sides be stayed pending the determination of Mr. Cotton's competency.

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[4] By an Order entered on September 12, 2003 (Docket No. 128), the undersigned denied Defendant's Motion to Dismiss Plaintiff Judi Cotton's Loss of Consortium Claim and Her Other Claims Which Are Derivative of Her Husband Ralph Cotton's Personal Injury Claim without prejudice. September 12, 2003 Order at 4. On February 26, 2004, the undersigned stayed Defendant's motions for further review of that decision pending the determination of Defendant's Motion for Summary Judgment. February 26, 2004 Order (Docket No. 142) at 1-2.

In the two-month period from the entry of the Initial Scheduling Order until the entry of the order staying discovery pending the determination of Plaintiff Ralph Cotton's competency, the only discovery taken by Plaintiffs was a single deposition. Certificate Regarding Discovery (regarding notice of the deposition of T. L. Royce) (filed September 12, 2001). During that two-month period, Plaintiffs' counsel failed to propound any written discovery requests. Indeed, at no time since this action was commenced has Plaintiffs' counsel served interrogatories, requests for production of documents, or requests for admissions. Defendant's Opposition to the Plaintiff's Motion to Compel Discovery (Docket No. 53) at 3 ("plaintiffs have never propounded any discovery request to WMATA under F.R.Civ.P. Rule 33 and 34 since this case began").[5]

On December 18, 2001, the undersigned, having received the report of the independent medical examination, ordered that the parties meet and confer regarding the application of Rule 17(c) of the Federal Rules of Civil Procedure (Docket No. 31). The parties were unable to agree, and on January 7, 2002, Defendant filed a Motion to Dismiss Claims of Ralph Cotton, or, Alternatively, for the Appointment of an Attorney at Law as Guardian [ad] Litem (Docket No.

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[5] Plaintiffs did file two motions to compel discovery. In their first motion to compel (Docket No. 8), Plaintiffs sought to compel Defendant's compliance with the initial disclosure requirements of Rule 26(a)(1), and to compel Defendant to produce a Rule 30(b)(6) designee for deposition. On the same date that the Initial Scheduling Order was entered, the undersigned denied Plaintiffs' motion without prejudice. See Defendant's Opposition to Plaintiffs' Motion for Protective Order (Docket No. 19) at 5. Plaintiffs never renewed the motion.

In their second motion to compel (Docket No. 48), Plaintiffs sought to "[compel] the Defendant to provide an index which identifies which medical records it received [in response to Defendant's request] from Plaintiff Ralph Cotton's health care providers." The records which Plaintiffs addressed in their second motion to compel were records which Defendant subpoenaed from Plaintiff Ralph Cotton's health care providers, and which Defendant agreed to copy and provide to Plaintiffs' counsel. The assertion that Defendant was "permitted . . . to pursue its own discovery into Ralph Cotton's medical history" (Plaintiffs' Memorandum at 26) is therefore incorrect. The undersigned denied Plaintiffs' second motion to compel on September 16, 2002, see Docket No. 57, and the trial court denied Plaintiffs' motion for reconsideration of the undersigned's order on August 21, 2003 (Docket No. 126).

34). The undersigned again ordered counsel to meet and confer regarding the status of discovery and Plaintiff Ralph Cotton's competence (Docket No. 52). While Plaintiffs' counsel did not intend to contest a finding that Plaintiff Ralph Cotton was incompetent, the parties disagreed regarding the appropriate person to represent Mr. Cotton's interests in the litigation.[6] On September 16, 2002, the undersigned determined "that notwithstanding the apparent stipulation regarding the incompetence of plaintiff Ralph Cotton, a competency hearing will be conducted so that the Court may make a more informed determination regarding the course of further proceedings." September 16, 2002 Order (Docket No. 58). The assigned district judge denied as moot Plaintiffs' motion for reconsideration of the undersigned's September 16, 2002 Order (Docket No. 63). August 21, 2003 Order (Docket No. 125).

During the competency hearing, held on September 20, 2002, Defendant called one witness, Dr. Lanning E. Moldauer. Dr. Moldauer testified that Plaintiff Ralph Cotton lacked the competency to provide truthful testimony either in a deposition or at trial, or to respond to any discovery requests. See Transcript of Competency Hearing Before the Honorable Deborah A. Robinson United States Magistrate Judge (Docket No. 69) at 15. Among Dr. Moldauer's conclusions was that Plaintiff Ralph Cotton's short-term and long-term memory were "both extremely poor . . . bottom one percent or less." Id. at 14. Dr. Moldauer further testified that Plaintiff Ralph Cotton's "[cognitive deficits] [are] so far below even a disputable threshold of

[6] "Plaintiff Judith Cotton, Ralph Cotton's wife, seeks to amend the complaint to be permitted to proceed as Next Friend; and the defendant suggests that a potential conflict of interest may exist between Ralph and Judith Cotton, and that the court may, in its discretion, decide to appoint an attorney at law as guardian [ad] litem to represent the interests of Ralph Cotton." Joint Statement Regarding Meet and Confer Conference (Docket No. 56) at 1-2.

competency that I could not imagine him getting back anywhere close to that threshold." Id. at 18. Plaintiffs offered no evidence at the hearing.

On September 25, 2002, the undersigned granted Defendant's motion for the appointment of an attorney at law to serve as guardian ad litem (Docket No. 60). The undersigned also scheduled a status hearing and scheduling conference for October 24, 2002, and required Plaintiffs' counsel of record, counsel for Defendant, and the appointed guardian to appear. In addition, the undersigned ordered counsel and the guardian to meet and confer in advance of the hearing. Id. In order to allow the appointed guardian the opportunity to meet with Plaintiff Ralph Cotton and confer with counsel, the undersigned continued the scheduling conference until January 9, 2003 (Docket Nos. 73, 74, 75, 76, 77).

At the October 24, 2002 conference, the undersigned vacated the stay of discovery, bifurcated discovery into liability and damages phases, and ordered that the liability phase proceed first. The undersigned permitted each side seven non-expert depositions, and set dates for the parties' Rule 26(a)(2) disclosures. The undersigned set July 1, 2003 as the date for the close of discovery. The undersigned further ordered that "plaintiffs . . . serve their answers to defendant's interrogatories by February 14, 2003, and that further discovery is stayed pending service of those answers."[7] January 13, 2003 Order (Docket No. 79).

[7] Defendant propounded the interrogatories in September, 2001. The parties had agreed that Plaintiffs would serve their answers to the interrogatories by September 28, 2002. Plaintiffs failed to serve the answers by September 28, 2002, and did not serve the answers until February 13, 2003. Joint Statement Regarding Meet and Confer Conference (Docket No. 56) at 2; Certificates of Discovery placed in file on or about February 13, 2003 (certifying that Plaintiff Judith Cotton's and the guardian ad litem's answers to interrogatories were served on all counsel February 13, 2003).

On March 3, 2003, Defendant filed a motion to compel (Docket No. 81), and maintained that the "answers to interrogatories and responses to requests for production provided by both plaintiffs were evasive and non-responsive, rather than good faith responses following a due diligence investigation[.]" Defendant's Motion [to] Compel Discovery and for Sanctions at 2. The undersigned granted Defendant's motion to compel on April 9, 2003, and ordered Plaintiffs to "serve complete, responsive answers to Defendant's interrogatories . . . no later than Wednesday, April 16, 2003[.]" Docket No. 88.[8] As of at least October 7, 2003, Plaintiff had not done so. Defendant's Reply to Plaintiff's Opposition to Motion for Summary Judgment ("Defendant's Reply") (Docket No. 136) at 8.

On April 9, 2003, the undersigned also ordered counsel to meet and confer regarding the scheduling of depositions. April 9, 2003 Order (Docket No. 88) at 2. Thereafter, Plaintiff's counsel, without explanation, walked out of a meet-and-confer session with counsel for Defendant, refusing to continue their discussion regarding the scheduling of depositions. Defendant's Opposition, Transcript of the Conference of Parties to Schedule Depositions (Exhibit B) at 16. Next, Plaintiff's counsel again failed to consent to a protective order which would have allowed Defendant to produce the proprietary documents of Schindler Elevator Corporation, which Defendant identified in its initial disclosures. Id. at 8. On June 20, 2003, the undersigned granted Defendant's motion for the protective order. June 20, 2003 Order (Docket No. 108). On June 24, 2003, the undersigned denied Plaintiff's motion to amend the scheduling order to allow an additional three weeks to serve Plaintiff's liability experts' Rule 26(a)(2)

[8]Plaintiff Ralph Cotton died on April 23, 2003. Suggestion of Death (Docket No. 95) at 1. Thereafter, the undersigned vacated the appointment of Mr. Cotton's Guardian ad Litem. Status Report of Guardian Ad Litem (Docket No. 118); see also n.1, supra.

reports, having found that the "proffered grounds fall far short of a showing of 'excusable neglect[.]'" June 24, 2003 Order (Docket No. 114). The undersigned granted Defendant's motion to preclude Plaintiff from calling any expert witness with respect to the issue of liability. Id.

CONTENTIONS OF THE PARTIES

Defendant's Motion

Defendant moves for summary judgment in its favor on three grounds: (1) Plaintiff is unable to establish a prima facie case of Defendant's negligence; (2) there is no evidence that WMATA had prior notice of any defect or malfunction on the escalator; and (3) Plaintiff's description of the acceleration of the right handrail prior to Mr. Cotton's fall is "impossible."[9] More specifically, Defendant submits that "[n]o one, including [Plaintiff], is able to state why Ralph Cotton fell on escalator no. 3 at National Airport Metrorail station on April 25, 1999[,]" and that "[w]ithout evidence of why Ralph Cotton fell, [Plaintiff] cannot prove a malfunction or defect which caused Mr. Cotton's fall." Defendant's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment ("Defendant's Memorandum") at 3-4; see also id. at 5. Defendant further submits that Plaintiff cannot show that Defendant had prior notice of a malfunction or defect, and "[is unable] to rebut the testimony of James Winn, WMATA's escalator engineering expert, that the escalator was in good condition, in compliance with all applicable safety codes, and that all maintenance on the escalator before the accident was timely,

[9] When Plaintiff was deposed, she stated that the right handrail had "[a]n actual jerk that just took [her] forward[,]" and "kept taking [her] off balance." Defendant WMATA's Motion for Summary Judgment, Judith Cotton's Deposition Transcript (Exhibit 3) at 72, 76.

appropriate and non-negligent." Id. at 4; see also id. at 9-10. Finally, Defendant submits that the unrebutted testimony of its expert witness is that "the very design of the escalator does not permit the right handrail event which Judith Cotton now claims occurred on the escalator." Id. at 12.

Plaintiff's Opposition

Plaintiff opposes Defendant's motion on two grounds. First, Plaintiff suggests that a factual dispute exists with respect to (1) whether Mr. Cotton "was caused to be catapulted down the descending escalator path by a malfunction in the mechanism of the machine";[10] and (2) the design of the escalator, "since industry standards belie Mr. Winn's testimony." Opposition to Defendant WMATA's Motion for Summary Judgment ("Plaintiff's Opposition") (Docket No. 130) at 1-2; see also Points and Authorities in Support of Plaintiff's Opposition to WMATA's Motion for Summary Judgment ("Plaintiff's Memorandum") at 1-5. Plaintiff includes a separate "Statement of Material Facts Which Raise Disputed Issues Requiring Jury Resolution" ("Plaintiff's Statement"). Plaintiff's Statement is a ten-page, 52-paragraph narrative of Plaintiff's contentions. In an effort to support these contentions, Plaintiff cites, and offers as exhibits, the transcripts of her deposition and the deposition of Terry L. Royce, a Metrorail station attendant; Mr. Cotton's medical records; articles published in trade journals; a Washington Times article; two affidavits filed by Defendant in support of its motion for summary judgment; two graphs; and copies of docket sheets, memoranda, orders and transcripts with respect to proceedings in this action.

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[10]Plaintiff has never alleged that Mr. Cotton was "catapulted" down the escalator. Indeed, there is no allegation in the Second Amended Complaint that Mr. Cotton fell. Rather, Plaintiff alleges only that as a result of Defendant's negligence, "Plaintiff Ralph Cotton was caused to suffer sever, painful, disabling and permanent injury[.]" Second Amended Complaint ¶ 5.

Second, Plaintiff requests that discovery be reopened, and that Defendant be ordered to "fully comply with Rule 26(a)(1) and the previously vacated Rule 30(b)(6) Notices of Depositions seeking documents, [sic] basic escalator information[.]" Plaintiff's Opposition at 2. Plaintiff submits that "Federal Rule 56(f) should prompt this court to reopen discovery to depose, [sic] My [sic] Young, Mr. Velesquez, Mr. Pope, Mr. Watson and Mr. Winn, since meaningful discovery into WMATA's basic escalator procedures was never allowed to occur in this litigation." Plaintiff's Memorandum at 5; see also Plaintiff's Statement ¶¶ 28-36.

Defendant's Reply

Defendant, in its reply, maintains that there is no evidence in the record of any escalator malfunction at the time Mr. Cotton sustained his injuries, and that the newspaper and trade journal articles regarding the operation of escalators other than the one on which Mr. Cotton rode are immaterial. Defendant's Reply at 12-18. Defendant also maintains that Plaintiff relies largely upon the account of events she offered when she was deposed during the course of this litigation, and that her account is not credible. Id. at 22-23.

Defendant suggests that Plaintiff's claim that she and Mr. Cotton were denied the opportunity to take discovery is unfounded, and that the incomplete discovery about which Plaintiff complains was caused by Plaintiff's counsel's conduct. Id. at 1-12.

DISCUSSION

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." FED. R. CIV. P. 56(c); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Diamond v. Atwood, 43 F.3d 1538, 1540 (D.C. Cir. 1995). The nonmoving party cannot merely rest upon the allegations contained in the complaint, and instead, must identify the specific facts which demonstrate that there is a genuine issue for trial. Anderson, 477 U.S. at 248. The burden is upon the nonmoving party to demonstrate that there are material facts in dispute. Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). There is a genuine issue of material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. Material facts are in dispute if they are capable of affecting the outcome of the suit under governing law. Id.

In the determination of a motion for summary judgment, all evidence and inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor." Anderson, 477 U.S. at 255; see also Bayer v. United States Dept. of Treasury, 956 F.2d 330, 333 (D.C. Cir. 1992). However, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Rather, "the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting FED. R. CIV. P. 56(e)).

Moreover, Rule 56(e) of the Federal Rules of Civil Procedure provides, in relevant part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but

> the adverse party's response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

FED. R. CIV. P. 56(e). The nonmoving party must therefore

> go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." . . . Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing[.]

Celotex, 477 U.S. at 324 (emphasis added).

The moving party is "entitled to judgment as a matter of law" against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Waterhouse v. District of Columbia, 298 F.3d 989, 992 (D.C. Cir. 2002) (quoting Celotex, 477 U.S. at 322). The evidence that the party offers to make the requisite showing must be evidence of the character which would be admissible. Simpkins v. Washington Metro. Area Transit Auth., 2 F. Supp. 2d 52, 56-57 (D.D.C. 1998); see also Stuart v. General Motors Corp., 217 F.3d 621, 635 n.20 (8th Cir. 2000) ("To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of FED. R. CIV. P. 56(e). Documents which do not meet those requirements cannot be considered."); Carmona v. Toledo, 215 F.3d 124, 131 (1st Cir. 2000) (finding that the "failure to authenticate precludes

consideration of their supporting documents" where instead of filing an "authenticating affidavit complying with Rule 56(e) to support [the] summary judgment motion[,]" the movant "simply appended a purported copy of the investigation file--unsworn, uncertified, and, at first, untranslated--to the motion.").

In addition, Local Civil Rule 7(h) provides:

> Each motion for summary judgment shall be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to the parts of the record relied on to support the statement. An opposition to such a motion shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement. . . . In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.

LCvR 7(h) (emphasis supplied); see also LCvR 56.1. The District of Columbia Circuit has held that "[i]f the party opposing the motion fails to comply with this local rule, then 'the district court is under no obligation to sift through the record' and should '[i]nstead . . . deem as admitted the moving party's facts that are uncontroverted by the nonmoving party's Rule [LCvR 7(h)] statement.'" Securities and Exch. Comm'n v. Banner Fund Int'l, 211 F.3d 602, 616 (D.C. Cir. 2000) (citation omitted). The District of Columbia Circuit "[has] explained . . . that the 'the procedure contemplated by the [local] rule . . . isolates the facts that the parties assert are material, distinguishes disputed from undisputed facts, and identifies the pertinent parts of the record." Burke v. Gould, 286 F.3d 513, 517 (D.D.C. 2002) (quoting Gardels v. Cent. Intelligence Agency, 637 F.2d 770, 773 (D.C. Cir. 1980)). This circuit has affirmed the grant of

summary judgment where the nonmoving party failed to cite any evidence in the record, and in the statement of genuine factual issues, "did not set forth specific, material facts, but simply asserted, without citing evidence in the record, that there was a disputed issue[.]" Burke, 286 F.3d at 518 (quoting Tarpley v. Greene, 684 F.2d 1, 7 (D.C. Cir. 1982)).

Finally, Rule 56(f) of the Federal Rules of Civil Procedure provides that

> [s]hould it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

FED. R. CIV. P. 56(f).

Compliance with LCvR 7(h)

Defendant supports its motion for summary judgment with a statement of material facts prepared in the manner prescribed by Local Civil Rule 7(h). The undersigned finds, however, that Plaintiff has failed to comply with the Local Civil Rule 7(h) requirement that an opposition to a motion for summary judgment "shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated[.]" Indeed, Plaintiff makes no effort to identify any "genuine issues," and instead, offers only a narrative account of Mr. Cotton's fall, his injuries and course of treatment, and press and trade journal accounts regarding escalator safety.[11] Plaintiff thereby

[11] For example, in the statements numbered five through eight, Plaintiff describes a series of events which is inconsistent with the allegations of her Second Amended Complaint. Plaintiff's Statement ¶¶ 5-8; see also n.10 , supra. In the statements numbered 15 through 21, Plaintiff, relying entirely upon an article published in a 1998 issue of Elevator World, represents the results of the "testing" of "WMATA escalators[.]" Id. ¶¶ 15-21.

fails to "[isolate] the facts that [she asserts] are material, and [distinguish disputed from undisputed facts.]" Burke, 286 F.3d at 517.

Comparable deficiencies have been deemed to warrant the exercise of discretion to treat the movant's statement of material facts as conceded. E.g., Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner, 101 F.3d 145, 151 (D.C. Cir. 1996) (statement of a nonmovant "[r]eplete with factual allegations not material to . . . substantive claims and repeatedly blending factual assertions with legal argument" does not satisfy the purposes of the local rule); Mack v. Strauss, 134 F. Supp. 2d 103, 108 (D.D.C. 2001) (nonmovant's statement "is riddled with self-serving, conclusory statements[,]" and for that and other reasons, cannot serve to refute movant's specific factual assertions). Should the court decline to exercise its discretion to treat the movant's statement of facts as conceded, the undersigned recommends that Defendant's motion for summary judgment be granted, and Plaintiff's request to reopen discovery be denied for the further reasons discussed herein.[12]

Evaluation of the Merits of Defendant's Motion and Plaintiff's Opposition

The undersigned finds that Plaintiff has failed to point to any evidence in the record of either (1) a defective condition on the escalator Mr. Cotton was riding at the time of the accident, or (2) Defendant's notice of any such defective condition. "The plaintiff in a negligence action bears the burden of proof on three issues: the applicable standard of care, a deviation from that standard by the defendant, and a causal relationship between that deviation and the plaintiff's

[12]"[T]he District of Columbia Circuit has cautioned that 'in view of the severity of dismissal of a potentially meritorious claim . . . [,] treating an issue as conceded for failure to respond fully to a motion for summary judgment should only be applied to egregious conduct.'" Haynes v. Williams, 279 F. Supp. 2d 1, 7 (D.D.C. 2003) (quoting Burke, 286 F.3d at 518-19 (internal quotations omitted)).

injury." Washington Metropolitan Area Transit Authority v. Jeanty, 718 A.2d 172, 173 (quoting Toy v. District of Columbia, 549 A.2d 1, 6 (D.C. 1988)); see also Youssef v. 3636 Corp., 777 A.2d 787, 792 (D.C. 2001) (holding that "generally, in order to prevail on a claim of negligence, the plaintiff must establish a duty of care, a deviation from that duty, and a causal relationship between that deviation and an injury sustained by the plaintiff"). A court may properly grant summary judgment where a plaintiff has failed to offer expert testimony establishing the standard of care, a deviation from that standard of care by the defendant or the cause of the escalator accident. Crenshaw v. Washington Metro. Area Transit Auth., 731 A.2d 381 (D.C. 1999).

For the reasons offered by Defendant, the undersigned finds that there is no evidence in the record of any defect or malfunction of escalator number three at the Reagan National Airport Metrorail station on April 25, 1999, the day Mr. Cotton fell. Defendant relies principally upon the affidavit of James B. Winn, an escalator technical consultant who was employed as WMATA's Superintendent, Elevator/Escalator Office, from 1991 through 1995. Mr. Winn, based on his personal knowledge, asserts

> 7. Before April 25, 1999, the escalator had been recently and properly maintained during inspections on March 23, 1999 and April 12 through 13, 1999, and the escalator was determined to be in good, sound operating condition and performing in accordance with its design requirements at the conclusion of each inspection. The maintenance provided was not negligent and was fully in compliance with applicable codes and the manufacture's design and performance requirements. On April 12 and 13, 1999, an annual inspection was performed on the escalator which would include every component of the escalator including the handrails and steps drives, the handrail tension and tracking, guide rails, motor chains and speed monitors. That inspection was performed in compliance with the applicable ASME A17.1 Code, as applicable in 1999, and as required by Schindler Elevator Corporation's Preventative Maintenance Procedures.

> 8. The condition of the escalator immediately following the April 25, 1999, accident involving Ralph Cotton's fall showed that Escalator No. 3 was properly maintained, operating normally and in accordance with all design and operating requirements established by the manufacturer and WMATA, and did not require any adjustment or repair to meet the A17.1 Code requirements. The escalator continued to operate throughout the April 25, 1999 incident which indicates no safety defects in the system, the post-accident inspection showed no problems, and the escalator did not require any significant repair for more than 4 months following April 25, 1999.

Defendant's Memorandum, Affidavit of James B. Winn ("Winn Affidavit") ¶¶ 1, 7-8.

Additionally, Mr. Winn reviewed the transcript of the deposition of Plaintiff, and states

> 6. The operation of Escalator No. 3 described by Judith Cotton during her deposition on September 18, 2001 could not have occurred in the manner described by her, and could not have caused Mr. Cotton's fall on the escalator. Mrs. Cotton's description of the rapid acceleration of the right handrail in relation to the step, as the escalator continued to operate, is impossible, because the step and handrail drive mechanisms are mechanically linked, and the movement of the handrail in that manner is inconsistent with the design of the escalator and its continuing operation. The step and handrail drive mechanisms of Escalator No. 3 are connected to a common motor and gear system, which structurally connects the steps and the handrail and, by design, that system requires that the steps move at the same rate of speed as the handrail. Any failure involving the handrail drive could not result in the handrail rapidly accelerating to a rate of speed faster than the speed of the steps. Additionally, according to Mrs. Cotton, Ralph Cotton was not holding the right-side handrail prior to the time of his fall.

Winn Affidavit ¶¶ 5-6. In sum, Defendant has offered competent evidence that the escalator in question was inspected and maintained in accordance with all applicable standards; there is no evidence of any defect or malfunction; and the escalator handrail could not have operated in the manner described by Plaintiff.

Plaintiff does not, as Rule 56(e) of the Federal Rules of Civil Procedure requires, "set forth specific facts showing that there is a genuine issue for trial." Instead, Plaintiff offers a version of events unsupported, and in some instances, contradicted, by the evidence in the case.

With respect to her account of the manner in which Mr. Cotton sustained his injuries, Plaintiff offers (1) the transcript of her deposition, and (2) the affidavit of Michael Dennis, M.D., one of Mr. Cotton's treating physicians, who relies upon what "Mrs. Cotton told me[.]" Plaintiff's Opposition, Affidavit of Michael W. Dennis, M.D. (Exhibit 3) ¶¶ 3, 4, 6. However, it is settled that such "self-serving" testimony, standing alone, "will not protect the non-moving party from summary judgment." Carter v. George Washington University, 180 F. Supp. 2d 97, 111 (D.D.C. 2001); see also Haynes, 279 F. Supp. 2d at 6 (citing Greene v. Dalton, 164 F.3d 671, 675 (D.C. Cir. 1999)) ("The District of Columbia Circuit has stated that the non-moving party may not rely solely on mere conclusory allegations."). Moreover, Dr. Dennis' affidavit is not based on his personal knowledge, and accordingly, lacks probative value. FED. R. CIV. P. 56(e)("[s]upporting and opposing affidavits shall be made on personal knowledge"); see Benn v. Unisys Corp., 176 F.R.D. 2, 4-5 (D.D.C. 1997). In any event, Plaintiff's account of the manner in which Mr. Cotton fell, even if credited, is not probative of the issue of whether there was a defect or malfunction of the escalator of which WMATA had notice, and which was the proximate cause of his unfortunate injuries. Crenshaw, 731 A.2d at 382.

With respect to her claim regarding a defect or malfunction of escalator number three at the airport Metrorail station on April 25, 1999, Plaintiff fares no better. Plaintiff offers only newspaper trade journal articles and graphs as evidence of a defect or malfunction. The undersigned finds that the articles and graphs are not competent evidence, and that Plaintiff's showing is insufficient to defeat summary judgment. Plaintiff has made no effort to demonstrate that the articles and graphs are relevant, material, authentic, and otherwise admissible. Indeed, all the articles and graphs appear to be inadmissible hearsay. Plaintiff fails to identify the source

of the graphs; the reports of testing of "WMATA escalators" are not material to the operation of the escalator number three on April 25, 1999; and the claim of Mr. Winn's supposed bias is entirely speculative.

Even assuming, arguendo, that Plaintiff proffered competent evidence of the existence of a defective condition on the escalator which caused Mr. Cotton to fall, Defendant would nonetheless be entitled to summary judgment, as there is no evidence in the record that Defendant breached the applicable standard of care, or that Defendant had notice of the defective condition. Crenshaw, 731 A.2d 381, 383 (D.C. 1999)(finding that the court failed "to see how a jury, in the absence of expert testimony or some other evidence of a violation of an established standard of care, can conclude that the jerking motion in this case, as opposed to any other jerking motion, is the result of negligence on the part of [WMATA]."); Dickens v. Clyde McHenry, Inc., 762 F. Supp. 400, 402 (D.D.C. 1991)(stating that "[i]n order to make out a prima facie case of liability based on the existence of a dangerous condition, the plaintiff has the burden of showing that the party against whom negligence is alleged had notice of that condition.").

Plaintiff's Rule 56(f) Request to Reopen Discovery

To the extent that Plaintiff, through her opposition to Defendant's Motion for Summary Judgment, seeks to reopen discovery pursuant to Federal Rule of Civil Procedure 56(f), said

request should be denied.[13] The course of discovery herein makes evident that both sides have had to conduct discovery. In sum, the record reflects that notwithstanding the stay of discovery occasioned by proceedings with respect to Plaintiff Ralph Cotton's incompetency, Plaintiffs' counsel has had the opportunity to propound interrogatories, requests for production of documents and requests for admissions, but has inexplicably refrained from doing so; to receive engineering documents which were identified by Defendant in its initial disclosures, but declined to agree to the protective order which would have allowed Defendant to produce the documents; to take up to seven depositions, but proceed with only one. Further, the record reflects that after the undersigned denied without prejudice Plaintiff's motion to compel Defendant's compliance with the initial disclosure requirements of Rule 26(a)(1), Plaintiff never renewed her requests. Significantly, Plaintiff never propounded any discovery requests upon Defendant seeking the documents she now complains were wrongly withheld. See Defendant's Opposition to Plaintiff's Motion for a Protective Order (Docket No. 19) at 5; see also Defendant's Reply at 12; May 28, 2003 Memorandum Opinion and Order at 10.

Moreover, Plaintiff has failed to establish any nexus between the depositions Plaintiff wishes to take (see Plaintiff's Opposition at 5) and the development of "facts essential to justify the party's opposition[.]" FED. R. CIV. P. 56(f). Instead, Plaintiff appears to contemplate

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[13]Federal Rule of Civil Procedure 56(f) requires that an opposing party file affidavits indicating "that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition[.]" FED. R. CIV. P. 56(f); Bancoult v. McNamara, 217 F.R.D. 280, 283 (D.D.C. 2003) ("a non-moving party seeking the protection of Rule 56(f) must state by affidavit the reasons why he is unable to present the necessary opposing material.") (citation omitted); Sanders v. Quikstak, Inc., 889 F. Supp. 128, 132 (S.D.N.Y. 1995) ("a party seeking additional discovery under Rule 56(f) must inform the court by affidavit (1) what facts are sought and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort the affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts) (citation omitted). Plaintiff has filed no such affidavit.

discovery as a means to shift Plaintiff's burden of proof to Defendant. See, e.g., Plaintiff's Opposition at 5 ("On its face, without any ESCalibrator testing, there is no factual basis to conclude, as a matter of law, that WMATA Escalator No. 3 performed without a speed deviation on April 25, 1999."). An order allowing discovery pursuant to Rule 56(f) would, in the context of this litigation, amount to little more than a fishing expedition.

CONCLUSION

For the foregoing reasons, it is, this 3rd day of March, 2004,

RECOMMENDED that Defendant WMATA's Motion for Summary Judgment (Docket No. 122) be **GRANTED** and that judgment be entered for Defendant with respect to all claims asserted in the Second Amended Complaint.[14]

March 3, 2004

DEBORAH A. ROBINSON
United States Magistrate Judge

Within ten days after being served with a copy, either party may file written objections to this report and recommendation. The objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for the objection. In the absence of timely objections, further review of issues decided by this report and recommendation may be deemed waived.

[14]As Plaintiff's claim for loss of consortium is wholly derivative of the survival claim brought on behalf of Mr. Cotton, the undersigned's recommendation includes both claims. See n.4, supra.